FILED BY CLERK
JAN -6 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JONATHAN JESSIE MUNIZ, Appellant.	)	2 CA-CR 2009-0289 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082814

Honorable John S. Leonardo, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Appellant Jonathan Muniz appeals his convictions for one count of endangerment and two counts of aggravated assault of a minor under fifteen. He maintains the trial court erred in rejecting his *Batson* challenge, in instructing the jury, and in imposing an enhanced sentence. Finding no error, we affirm.

Background

¶2 "We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdicts." *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). In July 2008, Muniz and two friends were in his backyard when Muniz fired a .22 caliber rifle at a can placed on the fence. C. and A. were playing on a swingset in their grandmother's yard, which was one yard over from Muniz's, and, according to the testimony of one of Muniz's friends, were "saying something [like], shoot me, shoot me, like joking around." Muniz then decided to shoot a chair that was in the yard next door "just to scare" the boys. Muniz's friends urged him not to shoot the chair because he might "miss[] and hit[] one of the kids." Muniz, however, assured them he would not miss the chair and fired the gun. C. fell to the ground after the shot was fired, but Muniz and his friends walked away thinking C. was playing. Muniz told his friends he hoped he had not shot the boy and left to "chill" with another friend.

¶3 After C. was shot, A. ran into the house and told his grandmother "they had killed" C. She found C. on the ground with a gunshot wound to his head. C. sustained serious physical and cognitive injuries.

¶4 After a jury trial, Muniz was convicted as charged and the trial court sentenced him to concurrent and consecutive sentences totaling 11.5 years' imprisonment. This appeal followed.

Discussion

I. *Batson* challenge

¶5 Muniz, who is Hispanic, contends the trial court erred when it rejected his challenge to the state's use of peremptory strikes to remove three of the five minority jurors initially seated on the jury panel. Muniz maintains that the prosecutor violated his equal protection rights by striking the jurors. *Batson v. Kentucky*, 476 U.S. 79 (1986), prohibits the use of a peremptory strike to remove a prospective juror from a panel based upon that person's race. *State v. Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d 787, 793 (App. 2007). When reviewing the court's ruling on a *Batson* challenge, we defer to its factual findings, but we review de novo the court's application of the law. *State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001).

¶6 A trial court's analysis of a *Batson* challenge involves three steps. *Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d at 793. Initially, the party challenging the strike "must make a *prima facie* showing of discrimination on the basis of race, gender, or some other protected characteristic." *Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d at 162. The proponent then must provide a neutral explanation for the strike. *Id.* Finally, the challenging party must persuade the court that the proffered reason is pretextual. *Id.* In this third step, the court must determine the credibility of the proponent's explanation and "'whether the proffered rationale has some basis in accepted trial strategy.'" *Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d

at 793, *quoting Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). "Th[e] third step is fact intensive and will turn on issues of credibility, which the trial court is in a better position to assess than is [an appellate c]ourt." *State v. Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d 833, 845 (2006). We therefore will reverse only if the trial court's factual findings are clearly erroneous. *See Gay*, 214 Ariz. 214, ¶ 16, 150 P.3d at 793.

¶7 The prosecutor used three of his six available peremptory strikes to remove three Hispanic venirepersons from the panel, leaving two others. Muniz raised a *Batson* challenge, and the trial court found a prima facie case of bias. The prosecutor explained his reasons for striking the jurors, and the trial court accepted his explanation as race-neutral and credible.

¶8 On this record we cannot find the court abused its discretion in accepting the state's explanation for striking the prospective jurors or in rejecting Muniz's suggestion that the state's explanation was pretextual. The prosecutor indicated he had been concerned about one potential juror because she had "star[ed] at [him] intensely"; had stated she watched television, then stated she did not like television, which indicated to the prosecutor that she could not "remain focused and follow what we are saying"; and had not "appear[ed] to know what [wa]s going on." The prosecutor stated another of the panel members had been "completely confused and exhibited bizarre behavior throughout [his] questioning."[1] Finally, he explained that he had struck a third prospective juror

[1]When asked about her primary source of news, the juror responded "I like Archie, I have every single book of Archie." When the court asked again about her source of news and asked if she read the newspaper regularly she responded, "[y]es, once and a

because he had kept his arms folded throughout voir dire and had appeared to have "[an] attitude" or "a chip on [his] shoulder[]." The prosecutor also expressed concern that this venireman had spoken about his child in a way that suggested he was not "a sincere, nurturing type of father" by referring to his one-year-old "kid."

¶9 The prosecutor thus expressed race-neutral reasons for striking these potential jurors, and the trial court, which was in the best position to determine whether he was being disingenuous and to observe the behavior and answers of the venirepersons, accepted his explanation. Muniz argues, however, that the prosecutor's explanations were "makeweight, pretextual, and d[id] not show evenhanded application with other jurors." He maintains that other venirepersons had also crossed their arms and that the prosecutor and the judge had referred to children as "kids" during the proceedings. But the *Batson* "process does not demand an explanation that is persuasive, or even plausible. . . . ['Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995), *quoting Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion); *id.* at 374 (O'Connor, J., concurring in judgment). We therefore cannot say the trial court erred in rejecting Muniz's challenge.

II. Requested negligence instructions

¶10 Muniz next contends the trial court abused its discretion in refusing to give certain instructions. Specifically he argues the court should have given three instructions

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while, not all the time." Later she also stated that "If you tell me, for example, he did it, I won't believe you, not unless he gives his version, that's the only way I believe."

he proffered—an instruction that defined civil negligence, another that defined criminal negligence, and one that set forth the effect of a finding of negligence. "The decision to refuse a jury instruction is within the trial court's discretion, and this court will not reverse it absent a clear abuse of that discretion." *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995).

¶11 Muniz argues that he was entitled to the above instructions on negligence because his defense was that he had been merely negligent and not reckless. The trial court, however, rejected these instructions, concluding that "[d]efining for [the jury] what the crime is not[,] and then going forward and further describing what it is[,] is unnecessary." We agree. Although entitled to an instruction "on any theory reasonably supported by the evidence," a party is not entitled to an instruction when the law is covered adequately by other instructions. *State v. Martinez*, 196 Ariz. 451, ¶ 36, 999 P.2d 795, 804 (2000). A court may refuse an instruction if it potentially is misleading or confusing to the jury. *See State v. Rivera*, 152 Ariz. 507, 517, 733 P.2d 1090, 1100 (1987). No reversible error occurs if the jury instructions, when read as a whole, sufficiently set forth the applicable law. *State v. Barr*, 183 Ariz. 434, 442, 904 P.2d 1258, 1266 (App. 1995). And, "[t]he failure to give an instruction is not reversible error unless it is prejudicial to the defendant and the prejudice appears in the record." *State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 31, 42 P.3d 1177, 1185 (App. 2002).

¶12 The trial court properly refused the instruction concerning civil negligence because of its potential to mislead or confuse the jury, whose task was to determine Muniz's criminal culpability for crimes requiring intentional, knowing, or reckless action,

but not his civil liability or criminal negligence. And the court instructed the jury correctly on the criminal offenses with which Muniz was charged, on the lesser-included offense of disorderly conduct, on the culpable mental state for the charged and lesser-included offenses, and on the jury's duty to find all the elements of the crimes proven beyond a reasonable doubt. *See* A.R.S. §§ 13-105(10)(a)–(c) (defining "intentionally," "knowingly," and "recklessly"), 13-1201(A) (endangerment), 13-1204 (aggravated assault), 13-2904 (disorderly conduct); *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995) (reasonable doubt instruction). Thus, the instructions as a whole sufficiently set forth the applicable law related to Muniz's charged offenses. And, Muniz was free to argue to the jury, as he did, that he had been merely negligent in firing the gun. Based on this record, we cannot say the court abused its discretion in declining Muniz's instructions or that Muniz was prejudiced as a result.

III. Other jury instructions

¶13 Muniz additionally asserts that the trial court improperly instructed the jury because it "inappropriately limited the role of defense counsel, and limited the jury's determination of witness credibility." According to Muniz, "these instructions denied [him] his constitutionally protected right to a fair trial." We review the instructions as a whole "to determine if they adequately reflected the law." *State v. Cordova*, 198 Ariz. 242, ¶ 11, 8 P.3d 1156, 1159 (App. 1999). "'We will reverse only if the instructions, taken together, would have misled the jurors.'" *Id.*, *quoting State v. Doerr*, 193 Ariz. 56, ¶ 35, 969 P.2d 1168, 1177 (1998).

¶14 Muniz maintains the trial court "improperly limited the jury's consideration of the argument of defense counsel" when it explained the role of counsel for the jury as follows:

> Nothing said or done by the lawyers who have tried this case is to be considered by you as evidence of any fact. The opening statements of the lawyers are intended to give you a brief outline of what each side expects to prove to you so that you may better understand the evidence. The closing arguments are often very helpful in refreshing your recollection as to the evidence. However, your verdict should not be based on the lawyers' statements but upon the evidence.
>
> The function of the lawyers is to point out those things that they consider to be most significant. And in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. What the lawyers say is not binding upon you. If your memory of the evidence differs from what the lawyers have represented it to be, it is your memory that controls. If you believe that the law as represented by the attorneys differs from the law as given by the Court, it is the Court's instructions on the law that control.

According to Muniz, this instruction "undermined the role of defense counsel" and intruded on the "wide latitude" given to counsel in argument. He also apparently maintains the court essentially instructed the jurors to disregard the arguments of counsel, specifically defense counsel's closing argument, thereby depriving him of a fair trial. We disagree.

¶15 The instruction properly informed the jury that the arguments of counsel are not evidence, *see State v. Adams*, 1 Ariz. App. 153, 156, 400 P.2d 360, 363 (1965), that the jurors should not base their verdict on such arguments instead of the evidence, *id.*, and that they should follow the trial court's instruction on the law rather than the

explanations of the law given by counsel should a conflict arise between the two. The instruction did not tell the jurors to disregard counsels' arguments entirely, as Muniz suggests.

¶16 Furthermore, we find Muniz's reliance on the authority he cites is misplaced. The trial court did not limit defense counsel's closing argument or otherwise intrude on the "wide latitude" given to counsel in argument. *Cf. State v. West*, 176 Ariz. 432, 446, 862 P.2d 192, 206 (1993) ("wide latitude afforded both parties in closing argument"), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998). Similarly, unlike the situation in *Herring v. New York*, 422 U.S. 853 (1971), on which Muniz relies, the court here did not refuse to allow him a closing argument entirely. Thus, the court's instruction on this point did not mislead the jury, and reversal is not required. *Cordova*, 198 Ariz. 242, ¶ 11, 8 P.3d at 1159.

¶17 Muniz also contends the trial court wrongfully commented on the evidence and "improperly limited the way the jury could analyze witness credibility by highlighting an innocent mistake in relation to a willful falsehood and by the use of part of a witness' testimony." The court instructed the jurors: "The credibility of a witness means the extent to which you believe the witness. The weight of the evidence means the extent to which you are or are not convinced by the evidence." And, the court told jurors that "[i]n weighing inconsistencies or discrepancies, you should consider . . . whether the discrepancy or inconsistency results from innocent error or willful falsehood" and that such discrepancies are "not an uncommon experience." The court also told the jurors

they "should use the tests for truthfulness that people use in determining matters of importance in everyday life," and listed several examples of such factors.

¶18 The Arizona constitution prohibits trial judges from commenting on the evidence presented at trial. *See* Ariz. Const. art. VI, § 27. "To violate this prohibition, 'the court must express an opinion as to what the evidence proves' or 'interfere with the jury's independent evaluation of that evidence.'" *State v. Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d 368, 388 (2006), *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998) (citations omitted in *Roque*). Here the court did neither. Nothing in the instruction suggested what the court thought the evidence proved. And, contrary to Muniz's contention, the instruction did not interfere with the jury's evaluation of the evidence.

¶19 Muniz claims the instruction could have been interpreted to suggest that discrepancies in the testimony of the state's witnesses were due to innocent error or misrecollection. But, the instruction also indicated that such discrepancies could arise from "willful falsehood" and could lead the jury to "discredit such testimony." The court also instructed the jury that they were "the sole judges of the credibility of the witnesses and the weight of the evidence" and charged them to "carefully evaluate . . . every matter in evidence that tends to indicate whether the witness is worthy of belief."

¶20 Neither did the trial court's instruction "single out or unduly emphasize any particular part of the evidence to the exclusion of the rest," as Muniz suggests. *State v. Godsoe*, 107 Ariz. 367, 370, 489 P.2d 4, 7 (1971). Rather, the court instructed the jurors merely that they should determine as to each witness whether that witness was "worthy of

belief" and whether or not they should "discredit" the testimony of a witness based on "the testimonies of differing witnesses." Such weighing of evidence is the proper role of the jury. *See State v. Fimbres*, 222 Ariz. 293, ¶ 4, 213 P.3d 1020, 1024 (App. 2009) ("'The finder-of-fact . . . weighs the evidence and determines the credibility of witnesses.'"), *quoting State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995). In sum, viewing the instructions as a whole, as we must, *see State v. Zaragoza*, 221 Ariz. 49, ¶ 15, 209 P.3d 629, 633 (2009), and given the context of the challenged instructions and the court's express charge that the jury alone was to decide whether inconsistencies were material and make all credibility determinations, we cannot say the instructions constituted a comment on the evidence that interfered with the jury's evaluation of the evidence.

IV. Sentencing

¶21 Finally, Muniz argues the trial court violated his rights by imposing an enhanced sentence "under the dangerous crimes against children statute . . . when the distinguishing elements of the . . . statute were not found by the jury beyond a reasonable doubt," as required by *Blakely v. Washington*, 542 U.S. 296 (2004).[2] Muniz raised this argument before sentencing in a memorandum. The trial court rejected the claim, concluding that the jury had expressly found that the victim was under fifteen and that "it [wa]s implied in the verdicts that [Muniz] directed his act to a victim under [fifteen]."

[2]The state notes in its brief that Muniz's sentences are illegal, arguing that under former A.R.S. § 13-604.01(L), the sentences should be consecutive and not concurrent. But, "[i]n the absence of a timely appeal or cross-appeal by the state seeking to correct an illegally lenient sentence, an appellate court has no subject matter jurisdiction to consider that issue." *State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990).

Whether the trial court correctly enhanced a sentence as a dangerous crime against children is a legal question we review de novo. *See State v. Sepahi*, 206 Ariz. 321, ¶ 2, 78 P.3d 732, 732 (2003).

¶22 "[I]n order to prove that a defendant has committed a dangerous crime against a child, the State must prove that the defendant committed one of the statutorily enumerated crimes and that his conduct was 'focused on, directed against, aimed at, or target[ed] a victim under the age of fifteen.'" *Sepahi*, 206 Ariz. 321, ¶ 19, 78 P.3d at 735, *quoting State v. Williams*, 175 Ariz. 98, 103, 854 P.2d 131, 136 (1993). Muniz concedes that the jury found both that he had committed an enumerated crime and that his victim had been under fifteen years old. But he maintains the jury "made no finding that [his] conduct was 'focused on . . .' a minor under fifteen years of age" and, he argues, the jury therefore did not find beyond a reasonable doubt that the crime was a dangerous crime against children. In contrast, the state argues "the jurors necessarily found that [Muniz] had focused his actions on a child under [fifteen] years of age."

¶23 But, even assuming arguendo that Muniz is correct that the jury failed to make the finding, we conclude any error is harmless. "*Blakely* error . . . can be harmless if no reasonable jury, on the basis of the evidence before it, could have failed to find [the facts] . . . necessary to expose the defendant to the sentence imposed." *See State v. Hampton*, 213 Ariz. 167, ¶ 72, 140 P.3d 950, 966 (2006). In this case, no reasonable jury could have failed to find that Muniz's assaults targeted a child. The victim was one of several children who were present when Muniz shot at the chair; testimony at trial established that before shooting at the chair Muniz had stated he wanted "to scare" the

children; and Muniz's friends warned him not to shoot because he could hit one of the nearby children. In view of this evidence, any reasonable jury would have found that Muniz's conduct was committed against a child. *See State v. Gurrola*, 219 Ariz. 438, ¶ 8, 199 P.3d 693, 695 (App. 2008) (reckless crime "committed 'against' a child when the conduct 'manifests a conscious disregard of a risk to children, as opposed to the general public,' even if harm to a child was not intended"), *quoting Williams*, 175 Ariz. at 101, 854 P.2d at 134.

Disposition

¶24 Muniz's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge